Filed 7/23/20 P. v. Torres CA5
(unmodified opinion attached)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT SHAUN TORRES et al.,

Defendants and Appellants.

F077391

(Super. Ct. No. F17902773)

ORDER MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

THE COURT:

It is hereby ordered that the nonpublished opinion filed herein on July 16, 2020, be modified as follows:

1. On page 9, the second sentence in the second paragraph under the Part II heading, commencing with the words "Garcia contends" and ending with "statute meaningless" is deleted and replaced with the following sentence:

> Garcia contends this is insufficient because a conviction based on whether the gun was loaded would render the term "operable" in the statute meaningless.

Except for the modification set forth above, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

DE SANTOS, J.

WE CONCUR:

MEEHAN, Acting P.J.

SNAUFFER, J.

Filed 7/16/20 P. v. Torres CA5 (unmodified opinion)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT SHAUN TORRES et al., Defendants and Appellants.	F077391 (Super. Ct. No. F17902773) **OPINION**

APPEAL from judgments of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant, Robert Shaun Torres.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant, Henry Joseph Garcia.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill, Julie A. Hokans and Dina Petrushenko, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Appellant Robert Shaun Torres was convicted by jury of possession of ammunition by a prohibited person (Pen. Code,[1] § 30305, subd. (a)(1); count 1) and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364; count 2). Appellant Henry Joseph Garcia was convicted by jury of possession of ammunition by a prohibited person (§ 30305, subd. (a)(1); count 3); possession of a firearm by a prohibited person (§ 29800, subd. (a)(1); count 4); possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 5); and misdemeanor possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 6). Torres admitted to suffering a strike prior (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prison prior (§ 667.5, subd. (b)). Garcia admitted to suffering one strike prior (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and three prison priors (§ 667.5, subd. (b)).

As to count 1, Torres was sentenced to the midterm of two years, doubled to four years due to the strike prior, plus one year for the prison prior. Torres received credit for time served on count 2. Torres's total sentence was a prison term of five years.

As to count 5, Garcia was sentenced to the midterm of three years, doubled to six years due to the strike prior, plus one year for the most recent prison prior. The court struck the other two prison priors in the interest of justice. As to counts 3 and 4, the court imposed the midterm of two years, doubled to four years due to the strike prior for each count. The court ordered the terms imposed on counts 3 and 4 to run concurrent with Garcia's sentence on count 5. Garcia received credit for time served on count 6. Garcia's total sentence was a prison term of seven years.

On appeal, Torres contends the evidence was insufficient to support his convictions under section 30305, subdivision (a)(1) and Health and Safety Code section

---

[1] Further undesignated statutory references are to the Penal Code, unless otherwise indicated.

11364. Garcia contends the evidence was insufficient to support his conviction under Health and Safety Code section 11370, subdivision (a). In supplemental briefing requested by this court on the issue of Senate Bill No. 136 (Stats. 2019, ch. 590, § 1) (Senate Bill 136), the parties agree the prison prior enhancements imposed as to both Torres and Garcia must be stricken. We strike Torres's and Garcia's section 667.5, subdivision (b) enhancements. In all other respects, we affirm the judgments.

FACTS

On May 10, 2017, officers from the Sanger Police Department executed a search warrant on a residence. In order to give notice of the search warrant to the occupants of the residence, the officers pounded on the front security door and yelled repeatedly "Sanger Police Department," "search warrant," and "open the door." No one answered the door, so the police forced open the security door using breaching tools and then entered through the front door. According to detective Brandon Coles, one of those who served the search warrant, it took "a while" to open the security door. As they opened the front door, Garcia was walking toward it. Garcia was removed from the residence. As the police entered the residence, they announced for other occupants to exit the rooms they were in. Torres exited from one of the bedrooms with a female. Four other people were removed from the residence.

In the bedroom from which Torres emerged, the police found two glass pipes with a crystal white substance inside of them, which appeared to be used for ingesting methamphetamine. The pipes were located along the wall behind the mattress of the bed. The police also found five shotgun rounds inside a camera case on the dresser next to a pair of men's boots. The ammunition matched a shotgun found in the living room under couch cushions.

The police believed the room from which Torres exited was his room because his nicknames, "Bro" and "Bro Dog," were in various locations, including etched on a dresser and inside one of the dresser drawers. "Bro" was written largely on a mirror.

"Bro" or "Robert" appeared in the room a minimum of eight times. Papers with Torres's name on them were scattered throughout the room. The names "Bro Dog" and "Robert" were not found in any other room. There was men's clothing and boots in the bedroom. Further, when Torres was being transported to the police department, he said he was living at the residence where the search warrant was served. Torres said the marijuana found in the room he was in was his but nothing else in the residence was his.

A "makeshift" bedroom built inside the garage was believed to be Garcia's. There, police found two packages of what appeared to be a controlled substance; one in the nightstand with Garcia's identification and some ammunition, and the second in a pill bottle found in a backpack with Garcia's name on it. Inside the nightstand were two firearm magazines; one loaded with .45-caliber ammunition and one unloaded. On the ground near Garcia's "room," police also found a .45-caliber Colt 1911 firearm under some debris. In the area where the firearm was found, there was a lot of dust and spiderwebs, but the firearm itself was clean.

The firearm found near Garcia's room was in good condition and did not seem to be old. The magazines found in the nightstand fit in the firearm. A loaded magazine was inserted in the firearm, and a round was inside the chamber. Officer Abraham Ruiz, one of the officers who served the search warrant, testified the firearm was "operable" "[b]ecause after locating the firearm [he] rendered it safe by pressing on the magazine release button which released the magazine and … racked the side of the firearm back which then ejected a 45-caliber round from the chamber."

There were two more rooms inside the house: one with a bed and one without. No one's identification nor illegal items were found in the other two rooms.

Torres stipulated that as to count 1, he was a person prohibited from possessing ammunition. Garcia stipulated he was a person prohibited from possessing ammunition and firearms as to counts 3 and 4.

Lisa Torres, Torres's mother, testified on Torres's behalf. She testified that Torres lived with her during the month of May and slept in his bedroom every night "[g]ive or take a night or two."

In rebuttal, officer David Johns testified that he had attempted to contact Torres at his mother's residence 18 to 20 times but only made contact with him four times.

DISCUSSION

Torres and Garcia each make claims regarding the sufficiency of the evidence supporting their convictions.

In assessing a claim of insufficiency of the evidence, we review "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Substantial evidence encompasses circumstantial evidence and reasonable inferences based on that evidence. (*People v. Pierce* (1979) 24 Cal.3d 199, 210.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' " (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.) " ' "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." ' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

I. Sufficiency of the Evidence to Support Torres's Section 30305 and Health and Safety Code Section 11364 Convictions

One of the elements of section 30305, subdivision (a)(1) is knowing possession of ammunition (see CALCRIM No. 2591), and one of the elements of Health and Safety Code section 11364 is knowing possession of a smoking device (see CALCRIM No. 2410).

Torres argues the evidence was not sufficient to support his convictions under section 30305 or Health and Safety Code section 11364 because the evidence did not support a finding that he "knowingly possessed" the ammunition found in the camera case nor the smoking pipes found between the mattress and the wall. We disagree.

Possession may be actual or constructive. "Actual possession means the object is in the defendant's immediate possession or control…. Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.) "The inference of dominion and control is easily made when the [item] is discovered in a place over which the defendant has general dominion and control: his residence [citation], his automobile [citation], or his personal effects [citation]." (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.)

Applying the substantial evidence standard of review, we conclude there was sufficient evidence from which the jury could infer that Torres knowingly possessed the ammunition and the pipes. Torres points out that no evidence was introduced to show that Torres was not sharing the room with someone else or that other persons stored belongings in the room. Torres also points out that no evidence was presented to show that mail found in the room had Torres's name on it or that the clothes or boots found fit him. However, in making all reasonable inferences in favor of the judgment, based on the evidence that Torres was in the room when the search warrant was served, admitted he lived at the residence, and that his name and nickname were pervasive around the

room but not in any others, it could be inferred the room and the belongings in it were his.

Torres argues despite the aforementioned evidence, that a "link" was missing in the circumstantial evidence tying him to the ammunition and the pipes and thus reversal is required, citing similar language from the California Supreme Court case, *People v Redrick* (1961) 55 Cal.2d 282 (*Redrick*). Specifically, Torres contends the evidence was insufficient to prove he knew of the existence of the ammunition or the pipes because they were not in "plain view." Because we find the evidence supports the inference that Torres lived in the room and the belongings in it were his, the jury could clearly make the inference that he knowingly possessed the ammunition in the camera case on the dresser. As for the pipes, Torres contends that even if he was the only occupant of the room, an item "underneath or behind the mattress, can remain undiscovered for weeks, months, or years—even by someone sleeping in the bed." We reject this claim.

In our reading of *Redrick*, we find the court's analysis supports upholding the jury's findings in the present case. In *Redrick*, the defendant lived in and managed a rooming house owned by Henry Smith. (*Redrick*, *supra*, 55 Cal.2d at p. 284.) There was a locked storeroom in the house, where police discovered 10 bindles of heroin. (*Id*. at p. 285.) Smith and the defendant were the only two people with official access to the key to the storeroom, but the key hung in Smith's nearby store and conceivably others could have accessed it, and thus the storeroom. (*Id.* at p. 284.) The defendant admitted to an officer that he was involved in drugs but denied the heroin was his. (*Id*. at p. 285.) He also denied possessing the key to the storeroom at the time of the search. (*Ibid*.) The *Redrick* court found that the admission of possession of narcotics "at about the time of the charged offense" was insufficient by itself to show he knowingly possessed the 10 bindles of heroin found by the police. (*Id*. at p. 288.) The *Redrick* court, however, noted that the defendant had told Smith he had the key a few days before the police search even though he had told police he had not had the key for three weeks. (*Id*. at

pp. 288–289.) Also, the defendant could not explain how the key went missing. The *Redrick* court found the totality of this evidence permitted an inference of consciousness of guilt—and therefore knowledge of—the presence of the narcotics in the storeroom was sufficient evidence to support the possession conviction. (*Ibid*.)

In *Redrick*, our Supreme Court noted, "no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic in a place to which he had access, but not exclusive access, and over which he had some control, but not exclusive control." (*Redrick, supra*, 55 Cal.2d at p. 287.) However, the court explained, "where the sufficiency of the evidence might otherwise have been doubtful, it was strengthened by a showing of consciousness of guilt." (*Id.* at pp. 287–288.)

Here, the officers were "pounding" on the door and repeating "Sanger Police Department," "search warrant," "open the door," and had to physically force their way into the residence. It is reasonable to infer a law-abiding citizen would respond to such orders by the police. Torres, however, did not open the door despite police orders and did not come out of the bedroom until the police had made their way into the residence and announced for people to come out. A jury could infer from his reticence to answer the door consciousness of guilt and knowledge of the contraband present inside his room. This inference could be strengthened by the evidence that though the methamphetamine pipes were not in plain view, they were not so deeply hidden that they were not accessible to occupants in the room. A jury could make a reasonable inference from the totality of these facts that Torres placed the pipes in the location where they were found in light of an immediate impending law enforcement search in attempt to avoid detection.

We also note that though Torres was not charged with unauthorized possession of a firearm, a shotgun matching the ammunition found in his room was discovered under a couch cushion in the living room. This further supports an inference that Torres was attempting to hide contraband before the police made their way into the residence.

We again quote our Supreme Court in *Redrick*: "The credence and ultimate weight to be given the evidence of the various particular circumstances are of course for the trier of fact, and 'It is the trier of fact, not the appellate court, that must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*Redric*k, *supra*, 55 Cal.2d at p. 289.)

For these reasons, substantial evidence supports the jury's finding that Torres knowingly possessed the ammunition and the pipes. Accordingly, Torres's convictions of violations of section 30305 and Health and Safety Code section 11364 were supported by sufficient evidence.

II. Sufficiency of the Evidence to Support Garcia's Health and Safety Code Section 11370.1 Conviction

Health and Safety Code section 11370.1 prohibits unlawful possession of a controlled substance "while armed with a loaded, operable firearm." (Health & Saf. Code, § 11370.1, subd. (a).) Garcia contends the evidence was insufficient to support that the firearm was "operable" within the meaning of the statute.

Garcia argues the only circumstantial evidence to show that the firearm was operable was the fact the firearm was loaded and extra rounds for the firearm were found nearby. Garcia contends this is insufficient because a conviction based on whether the gun was loaded would render the term "loaded" in the statute meaningless. We appreciate Garcia's argument, but we disagree that the only evidence supporting the inference the firearm was operable was that it was loaded.

Garcia concedes there was sufficient evidence to show that he *believed* the firearm was operable. This evidence includes the fact that Garcia had loaded the firearm and kept extra magazines and ammunition in his nightstand. Garcia asserts this same evidence was not sufficient to show the firearm was, in fact, operable. However, in addition to the

evidence that Garcia believed the firearm was operable, Ruiz testified that pressing the magazine release button released the magazine, and racking the side of the firearm ejected a round from the firearm. This contributed to his, a law enforcement officer with eight years' experience, opinion the firearm was operable. This testimony that the firearm's component parts were functional and the firearm appeared to be in good condition, was sufficient for the jury to conclude the firearm was operable.

Garcia asserts the prosecution should have "test-fired" the firearm to determine whether it was operable. While a test-fire of the firearm may have produced the best evidence of its operability, the jury's conclusion that the firearm was operable based on the evidence before it was logical and reasonable. In view of the foregoing evidence, it would have been unreasonable for the jury to conclude that the firearm was *not* operable. Based on the evidence that (1) the firearm was loaded and treated by Garcia as operable, (2) its component parts moved freely and as expected, and (3) the firearm appeared undamaged, for the jury to imagine the handgun was nonetheless inoperable would have required impermissible speculation. The record did not contain evidence that could create a reasonable doubt as to the gun's operability. We conclude the jury could reasonably have inferred that the firearm, based on this record, would operate as intended, absent any evidence to the contrary. We note that manufactured products are not assumed to be defective, but must be proven to be so (e.g., *Barrett v. Atlas Powder Co.* (1978) 86 Cal.App.3d 560, 564–566).

Garcia's conviction for a violation of Health and Safety Code section 11370.1 was supported by sufficient evidence.

III. Senate Bill 136

In October 2019, the Legislature passed Senate Bill 136, amending section 667.5, subdivision (b) (Stats. 2019, ch. 590, § 1). Prior to these amendments, "[i]n sentencing a defendant for a new felony offense, a one-year sentence enhancement under section 667.5, subdivision (b) [was] applied 'for each prior separate prison term or county jail

term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) The only exception was for a defendant who had remained free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. (*Ibid.*) Senate Bill 136 amended section 667.5, subdivision (b) to state that a one-year term under that section shall be imposed "for each prior separate prison term for a sexually violent offense …." Thus, Senate Bill 136 eliminates the prior prison term enhancement except in cases involving sexually violent offenses. The law went into effect January 1, 2020.

We requested supplemental briefing from the parties addressing whether the amendment is retroactive to appellants and if so, what is the proper disposition in this case.

As to retroactivity, the parties state, and we agree, that the amendment applies retroactively to appellants. The statute applies retroactively because the amended statute leads to a reduced sentence. (See *People v. Brown* (2012) 54 Cal.4th 314, 323–324; *In re Estrada* (1965) 63 Cal.2d 740, 745, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"].) Further, none of Torres's nor Garcia's prior convictions were for a sexually violent offense. Accordingly, under section 667.5, subdivision (b), as amended, neither Torres nor Garcia would qualify for the imposition of the one-year enhancement imposed for each of their prior prison terms.

Torres, Garcia, and respondent agree the proper disposition would be to strike each prior prison term enhancement. Respondent concedes remand for resentencing is not appropriate, citing *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258–1259, because there is no sentence which the trial court can structure upon resentencing to account for the one-year reduction in punishment without impermissibly increasing the aggregate term above the original sentence.

Accordingly, we will strike the section 667.5, subdivision (b) enhancements imposed in this matter as to both Torres and Garcia. We will direct the trial court to cause to be prepared amended abstracts of judgment reflecting these modifications, and to reduce Torres's and Garcia's total prison sentences accordingly. (See *People v. Lopez* (2019) 42 Cal.App.5th 337, 342–343.).

DISPOSITION

Torres's judgment is modified as follows. The one-year enhancement imposed pursuant to section 667. 5, subdivision (b) is stricken. With this modification, Torres's judgment is affirmed.

Garcia's judgment is modified as follows. The one-year enhancement imposed pursuant to section 667.5, subdivision (b) is stricken. With this modification, Garcia's judgment is affirmed.

The trial court is directed to cause to be prepared amended abstracts of judgment reflecting these modifications and Torres's resulting total prison sentence of four years and Garcia's resulting total prison sentence of six years. The court shall forward certified copies of the same to the appropriate authorities.

DE SANTOS, J.

WE CONCUR:

MEEHAN, Acting P.J.

SNAUFFER, J.